Responses to Questions from the ABA Practice & Procedure Committee

Midwinter Meeting 2006

Time Targets and Short Notice to Charged Parties - Numerous participants raised the problem of Regions investigating a case for weeks or months and then notifying the charged party that they have only a week or a similarly short period of time to respond, regardless of the complexity of the case or availability of counsel or witnesses. Because this is recurring problem in many regions, what is the General Counsel's position on steps that might be taken to ameliorate the appearance of unfairness? Are there circumstances when the time targets are extended or the case is "permitted" to go overage when a region is not ready to issue a decision on the merits?

Response - The Agency seeks to afford parties a reasonable period in which to provide evidence in support of their positions. The time targets set for completion of investigation are based on the Agency GPRA goals. The time targets contemplate that Regions will provide adequate time to charging parties to present evidence in support of the charge and to charged parties to respond to the allegations contained in the charge. We expect that occasionally Board Agents and the respective parties will differ with respect to the definition of "adequate time." Our experience is that requests for extensions of time to present evidence usually are resolved in a mutually satisfactory manner. If a party or representative is unable to resolve an issue concerning the deadline for presentation of evidence, he or she should contact the Regional Director.

Regarding the second question, the goals set for the Regional Directors to dispose of their cases contemplate that certain cases cannot be decided within the established time targets. In this connection, a number of our goals are expressed as medians and the failure to meet a goal in a particular case can be "excused" under criteria well known to the Director.

Opportunity to Respond During Investigation - Is there a policy regarding the production of documents during an investigation, specifically where the document was purportedly generated by the party being questioned about it and where the party does not have a copy of the document?

Response - This question presents an atypical situation, one that -- in our experience -- occurs infrequently during the investigation of unfair labor practice charges. Nevertheless, the issue of producing documents implicates various Agency policies and requires a Board agent and the Regional office to use good judgment and sound discretion.

On one hand, Section 102.118(a)(1) of the Rules and Regulations generally prohibits a Board agent from producing "any files, documents, reports, memoranda, or

records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent" of the General Counsel.

On the other hand, the Agency's and the individual Board agent's objective during an investigation is to gather the relevant evidence -- which may include letters, records and other documents -- pertinent to the allegations in a charge. Casehandling Manual Section 10054.1 states that a charging party is responsible for proving "all relevant documents within its possession," and Section 10052.3 notes, "it is imperative for the charging party to bring all relevant documents to the interview and [the Board agent] should assist the charging party in identifying those documents." In meeting with charged party witnesses and representatives, Section 10054.4 states that Board agents "should relate the basic contentions that have been advanced with regard to all violations alleged." Section 10054.4 also provides that the Board agent "normally would disclose" to the charged party "such information as the general nature of the conduct (e.g., threat of discharge), the general locale, the identity of the supervisor involved, and the date of the conduct." During an investigation, however, the Board agent also has an obligation to protect the identity of witnesses. Therefore, Section 10054.4 also cautions that when questioning a charged party "the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness."

We can easily envision a situation in which the Board agent will request any of the parties to a case to identify a document; to admit -- or dispute -- a document's authenticity; or to acknowledge, clarify or refute the accuracy and truthfulness of statements made in a document. Nevertheless, a party does not necessarily need a copy of a specific document in order to address or answer these points. In conducting this inquiry, the Board agent and the Regional office must adhere to the obligations under Section 102.118 of the Rules and Regulations as well as the guidance found in the Casehandling Manual. In most situations, even without a copy of a specific document, based on a Board agent's careful questions, a party should be able to identify a document, admit or dispute its authenticity, or acknowledge or deny its truthfulness.

Regions have broad discretion in handling these details of the investigation. There may be circumstances where the Board agent will hand over the document in question, others where she will not and where the party can seek the permission of the General Counsel under Section 102.118(a)(1) for production of the document. That said, we'll encourage our Directors to be as flexible as possible given the circumstances.

Deferral of Charges - What is the policy regarding sending status letters to parties in deferred cases? Do both charging and charged parties receive requests for status reports? Please provide an update on the progress of cleaning up the backlog of deferred cases.

Response - Pursuant to §10118.5 of the casehandling manual, Regions are expected to, and do, conduct follow-up inquiries on all deferred cases every 90 days. The

decision to contact both the charging and charged parties is left to the discretion of the Regional Director. Inasmuch as the charging party has the obligation to fully cooperate in the investigation and processing of the charge, follow-up contact with the charging party suffices in a majority of these cases. However, there are instances in which follow-up inquiries will be made of the charged party.

The Regional Offices are continuing the program to reduce the number of *Collyer* cases that have been pending for significant periods of time. The Regions began this project in FY 2002 by communicating with the parties to cases in deferred status for 5 or more years and inquiring as to the status of the dispute. If the charging party was not cooperating in securing an arbitral resolution to the dispute, the charge was dismissed. If the charged party was at fault for the delay in reaching arbitration, the deferral was revoked and the investigation pursued. As a result of this more aggressive policy, the number of cases *Collyer*-deferred for 5 years or longer was reduced from approximately 1,000 to 384. In FY 2003, the Regional Offices turned their attention to cases deferred in excess of 3 years. As a result, the number of cases deferred 3 years or longer was reduced from approximately 2,000 to 356. In FY 2004, the Regions began making inquiries concerning the status of cases in deferral for 2 or more years. These efforts led to a reduction in the number of such cases to 675 on October 1, 2004 from 3,217 that had been pending on October 1, 2002. By the end of FY 2005, the Regions reduced the number of Collyer cases pending more than 3 years to 242 cases, a reduction of 33 percent over the previous year, and deferred cases pending more than 2 years to 587 cases, a reduction of 12 percent.

Investigative Subpoenas - Please provide current statistics regarding the utilization of investigative subpoenas by Region. How often does the Agency go to court to enforce investigative subpoenas?

Response – In FY 2005, investigative subpoenas were issued by Regional Directors 444 ULP cases, or 1.79% of all of the ULP cases investigated during the year. About 60% of these were Ad Testificandum subpoenas. In about 58% of the cases in which we issued subpoenas merit was later found to some or all of the charge allegations. By way of comparison, merit was found in 36.5% of all cases investigated in FY 2005.

Fifty motions to quash subpoenas were filed with the Board in FY 2005. Of that total, 14 were withdrawn or settled, the Board issued rulings in 14 other cases and the remainder were pending at the end of the fiscal year. In its rulings, the Board denied the motions in 13 cases and in the remaining case, granted the motion in part. We were required to go to court on seven occasions in FY 2005 to enforce investigative subpoenas. In the seven enforcement cases, the Agency prevailed in four cases and three others either remain pending or were resolved without the need of a court decision.

These numbers are comparable past years' statistics and, in our view, reflect that our Directors are using the Section 11 subpoena authority circumspectly and wisely.

Unfair Labor Practices: Opportunity to Respond - Is there any guidance or policy when the Board Agent initially advises the charging party that a regional director is inclined to issue complaint, but later changes his/her mind because there is an absence of Board precedent but does not give the charging party an opportunity to offer legal authority in support of the charge?

Response – Again, this appears to be atypical and the short answer is that we should be making every effort to give the charging party an opportunity to be heard in the circumstances described. Certainly, no Agency policy precludes consideration of a party's views on relevant legal issues. To the contrary, the Regional offices -- and the parties – can only benefit when all legal questions and authorities are identified and considered. Regardless of whether a Regional Director is inclined to issue complaint or dismiss a charge, the Agency seeks each party's cooperation throughout the entire investigation -- including full consideration of their legal positions -- provided the parties submit their views consistent with the timely processing of the case.

To this end, Sections 10050 and 10052.7 of the Casehandling Manual state that Board agents should freely identify and discuss the theories underlying the charge with both parties. Section 10054.4 further adds that, "[p]articularly when the case includes pivotal questions of law, the Board agent should candidly disclose the legal theories under consideration and invite the charged party to file a statement of position or memorandum of law regarding such matters, provided it is submitted consistent with the time goals for the case."

When charges raise novel issues of law or policy, Regional Directors routinely submit such cases to the Division of Advice. In those circumstances, Casehandling Manual Section 11750.1 provides that the Regional Office should notify the parties that the case is being submitted to Advice, identify the specific issue(s) involved, and "[i]f the parties have not submitted a position on the advice issues, they should be invited to do so promptly."

Indeed, if a Regional Director reaches a decision on a charge – either by announcing that a complaint will issue absent settlement or by soliciting withdrawal of the charge or issuing a dismissal letter – and thereafter one of the parties brings evidence or authority to the Director's attention that argues contrary to the Director's decision, the Director will reconsider the disposition of the charge.

In light of the GC Memo, what has been the experience with charges alleging violation of Section 8(b)(4)(B) that implicate the 1st Amendment?

Response - In Memoranda OM 02-104, dated September 20, 2002, and OM 05-14, dated November 29, 2004, Regional Offices were given instructions concerning how to handle Section 8(b)(4)(ii)(B) charges that allege bannering within the parameters of *Carpenters Local 1506 (AGC San Diego Chapter, Inc.),* Case 21-CC-3307, JD (SF) 30-03 (May 9, 2003) (online at http://www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD(SF)-30-03.pdf), exceptions filed.

In memorandum OM 05-14 (November 29, 2004), Regional Offices were authorized to dismiss any charge that did not have arguable merit and, with respect to any arguably meritorious charge, to consult with the Injunction Litigation Branch on whether to hold the case in abeyance until the Board decided certain lead cases pending before it.

Our experience pursuant to OM 05-14 included a number of close cases that did not easily lend themselves to telephonic consultations between the field and Washington. Accordingly, to facilitate consideration of these cases and to assure consistency nationwide, Regional Offices have been instructed to submit to the Division of Advice all cases involving bannering or the display of an inflated rat or other "expressive" activity such as "street theater". See Memorandum OM 06-42, dated February 15, 2006.

Section 10(j) petitions - What are the statistics in the last year, both in terms of numbers and types of cases? Is there a uniform practice with regard to the seeking of 10(j)s by regional directors after an ALJ decision or after an ALJ hearing? Is there a recommended practice for regions with regard to solicitations of 10(j)s from charging parties? What about solicitation of responses from Respondents when 10(j) has been requested by a charging party?

Response - In Fiscal Year 2005, the Regional Offices submitted 61 Section 10(j) cases to the Injunction Litigation Branch. Of those requests, the General Counsel sought Section 10(j) authorization from the Board in 22 cases. The Board authorized 15 cases, and denied authorization in three cases. The remainder were either pending before the Board at the end of the fiscal year or the underlying administrative case settled before the Board acted on the General Counsel's request. The 15 authorized cases were distributed among the following Section 10(j) categories, Category 1, Interference with organizational campaign (no majority); Category 2, Interference with organizational campaign (majority); Category 4, Withdrawal of recognition; Category 5, Undermining of bargaining representative; Category 6, Minority union recognition; Category 7, Successor refusal to recognize and bargain and Category 8, Conduct during negotiations.

The three cases in which the Board denied Section 10(j) authorization involved Category 3 (subcontracting or other change to avoid bargaining obligation), Category 4 (withdrawal of recognition), Category 7 (successor refusal to recognize and bargaining), and Category 8 (conduct during negotiations). Of the 15 cases that the Board authorized, District courts granted injunctions in whole or part in six cases and denied an injunction in one case; seven cases settled; and one case was withdrawn prior to a court decision. Thus, the Board's 10(j) "success rate" for Fiscal Year 2005, which includes litigated and settled cases, was 93%.

While the General Counsel normally seeks 10(j) authorization from the Board after the issuance of a complaint, pursuant to GC Memorandum 94-17, "Expedited

Hearings," dated December 29, 1994, Regions have authority to pursue an expedited ALJ hearing rather than initially seeking 10(j) authorization: (1) when the prima facie case warrants Section 10(j) relief but the charged party has refused to cooperate in the investigation and the Region believes that it will raise a substantial defense, or (2) when a Region concludes that resources will be saved by scheduling an expedited hearing rather than recommending injunctive relief because an early hearing is likely to prompt settlement. This policy has been expanded to include cases in which there are substantial credibility issues or other circumstances that warrant an expedited hearing and a review of the evidence introduced at trial before making a Section 10(j) decision.

Presence of Charging Party's Counsel While Regional staff prepare Neutral Witness for Trial - What is the policy, post-issuance of complaint, for an attorney's presence in the Board's trial preparation of a non-party witness?

Response - ULP Casehandling Manual Section 10058.4 sets forth the General Counsel's policy with respect to third-party witnesses during the investigation of unfair labor practice cases. This policy is equally applicable to interviews in preparation for trial. As set forth in Section 10058.4, longstanding Board policy provides that the attorney or other representative of a party to the case will not normally be allowed to be present at an interview of a witness who is not a supervisor or agent of that party. If the witness insists on the party attorney or representative being present, the Regional Office should exercise discretion whether to proceed with such an interview.

If, however, it is asserted that an attorney of a party to a case also represents a third-party witness as an individual, both the attorney and the witness should be directed to provide written notice that the attorney represents the witness. If the circumstances raise questions as to whether a consensual attorney-client relationship exists or whether the attorney's interactions with an employee witness were consistent with employee Section 7 rights, including the dictates of *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), or if the Regional Office has a substantial basis to believe that the presence of an attorney of a party would impede the Agency's investigation [or trial preparation], the Regional Office should consult with the Special Litigation Branch in Washington on how to proceed.

If the Regional Office is satisfied that there is a consensual attorney-client relationship, that the attorney has not violated the employee witness's Section 7 rights, and that the presence of the attorney would not impede the investigation, then the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present. If, on the other hand, the attorney consents to an interview without the attorney's presence, the Board agent may proceed to interview the witness

If it is asserted that a non-attorney representative of a party also represents a third-party witness as an individual, the Regional Office may exercise its discretion whether or not to conduct the interview in the presence of such non-attorney

representative. Regional Directors will exercise their discretion in this area consistent with the policies set out in the Casehandling Manual.

There is a consensus that the Agency should notify the parties when a case is submitted to Advice, as well as the issues that are going to be considered. While there is enthusiastic support for the publication of Advice memoranda on the web, is there a way to ensure that parties are notified of the referral and the outcome, as well as ensuring that memos are not posted until all parties have been advised of the disposition of the case?

Response - Outstanding instructions require Regional Offices to notify the parties when and on what issues a case is being sent to Advice.

The Office of Legal Research and Policy Planning is responsible for posting Advice memoranda in closed cases on the Agency's website. Recent changes in the posting process have eliminated unnecessary delays in posting memoranda. As a consequence of these changes, there was an incident in which an Advice Memorandum authorizing dismissal in one case was inadvertently posted before the Region had notified the parties of the Advice determination. To avoid such incidents in the future, the Office has adopted procedures to ensure that Advice memos directing that charges be dismissed ("no complaint" memos) will not be posted on the Agency's website until after the Region has notified the parties of the Advice determination.

Default Language in Settlement Agreements - What is the policy with respect to insertion or proposed insertion of default language in informal settlement agreements?

Response - As set forth in GC Memorandum 02-04, "Best Practice Compliance Case Report," dated February 11, 2002 and OM Memorandum 05-96, "Casehandling Instructions Regarding the Use of Default Language in Settlement Agreements, " dated September 16, 2005, the General Counsel's policy is that Regional Offices should include default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. In particular, the General Counsel's policy provides that, consistent with Section 10603 of the NLRB Compliance Manual, in situations involving the payment of large amounts of backpay by installment payments, an informal settlement agreement should include either default language or a security agreement.

Issuance of Certification in Election with No Objection - In at least one region, the average time it takes for the issuance of a certification after an election where there were no objections is approximately 10 to 14 days. Another region indicated that a request for an expedited issuance of a certification would be given priority. Why should it take so long?

Response - In cases where no objections to an election have been filed, the Regional Director will issue the appropriate certification for the outcome of the election as soon as

practicable after the expiration of the 7-day period that the parties have to file objections. Because of the application of the "mailbox rule" to such filings, Regions prudently wait 2 – 3 days after the 7-day period before issuance of the certification. While issuance of the certification after the 7-day period may also be influenced by the workload of the Region, it should not be unreasonably delayed. If parties or practitioners experience regular delays in a Region's provision of certifications, they should bring the matter to the attention of the Regional Director and, if not properly addressed, to Operations-Management.

Setting RC Hearing Dates - After a representation petition is filed does the General Counsel have a uniform standard for scheduling R-Case processes? What percentage of regions, and specifically which regions, meet the stated goal of having 90 percent of the elections within 56 days of the filing of the petition?

Response - The procedures for the processing of representation petitions are contained in the Board's Casehandling Manual, Part Two, Representation Proceedings. Generally, hearings are scheduled by the field offices to ensure that we meet the General Counsel's GPRA goals of conducting elections within 42 median days from the filing of a petition and conducting 90 percent of all elections within 56 days of the filing of the petition. In FY 2005, on a national basis we conducted our election in a median of 38 days, with all Regions making or bettering the 42 median day goal. Also on a national basis we conducted 94.2% of our elections within 56 days. Only four Regions did not meet this goal. Those offices that did not meet the goal only missed doing so by a few percentage points. Our GPRA goals are expressed on an Agency-wide basis only and our performance against those goals is reported to OMB and to the public on that basis.

"Full" Consent Elections - What has been the experience with the full consent election procedure? In view of *Freightliner*, Case 11-RC-6609, what is the distinction between a full consent agreement and a stipulated election?

Response - On January 25, 2005 the Board published in the Federal Register final revisions to Parts 101 and 102 of its Rules and Regulations. These revisions include a new Section 102.62(c), which provides a third election agreement option for parties to a representation case. New Section 102.62(c) provides the parties with the opportunity to enter into a voluntary agreement to have the Regional Director conduct a hearing and thereafter resolve with finality all pre-election factual and legal disputes. The parties thereby waive their rights to file a request for review of the Regional Director's decision to the Board. The revised Rules are available on the NLRB Internet Website.

The aim of this new subsection is to provide an option for a quick and fair election with prompt resolution of both pre- and post-election disputes through the expert and impartial application of representation law by means of binding decisions by a Regional Director.

The new procedure was formally rolled out to the Regions by Memorandum OM 05-40 on March 21, 2005. To introduce the "full" consent election process to the parties involved in newly filed representation cases, we provide an introduction to the new procedure when we serve each new petition. Notwithstanding our best efforts to familiarize the Bar and the parties with the advantages of the procedure, including savings in time and costs, only one "full" consent election has been conducted since the procedure was introduced.

While the parties have not yet embraced the "full" consent procedure, the introduction of the new procedure appears to have sparked new interest in the traditional consent election procedure. Thus, while in the recent past from 85 to 95% of the elections we conduct are pursuant to stipulations, traditional consents entered into by the parties have numbered only a handful prior to FY 2005. Last year, however, perhaps because of the publicity given to the "full" consent procedure, the count on traditional consent election agreements was 94.

The case to which you refer, *Thomas Built Buses, a subsidiary of Freightliner, LLC,* Case 11-RC-6609, involved a traditional consent agreement pursuant to which a Board election was conducted on June 29, 2005. The union won the election and neither party filed objections. A motion to intervene was filed, however, by several employees in the unit seeking to file objections. That motion was denied by the Director and in the absence of objections from the parties, certification of representative issued on July 8. The employees sought special permission to appeal to the Board from the Director's denial of their motion to intervene and, on November 10, the Board granted the request to appeal and denied the motion. In so doing the Board stated in pertinent part: "The movants' papers do not support collusion by the parties to deprive employees of their Section 7 rights or other special circumstances to warrant their intervention in this proceeding. See *Belmont Radio Corporation*, 83 NLRB 45, 46 fn.3 (1949); *Shoreline Enterprises of America*, 114 NLRB 716, 716 fn. 1 (1955). We therefore grant the employees' request to appeal, and deny the appeals on its merits."

A party's right to challenge a Regional Director's decision on post-election matters after having entered into a consent election agreement was not in issue in the *Thomas Built* case.

Saint-Gobain Abrasives - What has the experience been with respect to processing these cases? Have any "best" practices been developed or issued?

Response - On December 9, 2004, we issued OM 05-20 which provided casehandling guidance regarding *Saint-Gobain Abrasives*, 342 NLRB No. 39 (2004). This memorandum highlighted the holding in *Saint-Gobain* and reminded Regional Directors that *Saint Gobain* issues arise only where the Regional Director finds merit to an unfair labor practice charge and further finds, under the multi-factor causation test of *Master Slack*, 271 NLRB 78 (1984), that the ULP conduct caused the disaffection among employees. The blocking charge policy was not affected by the *Saint-Gobain* decision. Since the issuance of OM 05-20, Regional Offices have reported very few cases where

the *Saint-Gobain* case has come into play. While unfair labor practice charges often accompany the filing of decertification petitions, our experience has been that only a very limited number of these petitions are dismissed based upon findings of merit in related unfair labor practice charges filed against the employers involved.

The General Counsel has not issued any additional instruction regarding the application of *Saint Gobain*. The primary guidance continues to be that set forth in OM 05-20.

Interpreters - What percentage of hearings require interpreters and what is the breakdown by language? Are any records kept of translation mistakes made at hearings and how is the Agency seeking to improve? Does the General Counsel's office have a set of uniform instructions that it gives to interpreters? Has any thought been given to having audio tapes or video tapes of hearings conducted with translators so that the record can be corrected, if necessary? We understand that there was some process within the agency to systematize standards around interpreting. Is there a mechanism for the Bar to participate in setting standards for translators? There is a consensus that there should be an ad hoc ABA-Agency committee to develop standards for interpretation issues in case investigations and hearings.

Response - No records are maintained as to the number of hearings that require interpreters in the Regional Offices. Nor are complete records kept on the languages requiring interpretation at hearings. However, based on reviewing the expenditures for interpretive services over the past several years, casehandling needs required the use of the following languages: Albanian, Arabic, Bengali, Bosnian, Cambodian, Cantonese, Creole, French, Greek, Guajarati, Haitian, Hebrew, Hindu, Hungarian, Italian, Japanese, Korean, Laotian, Polish, Romanian, Russian, Serbian-Croatian, Spanish, Tagalog, Turkish, Vietnamese, and Yiddish. Records are not maintained on translation mistakes in the Regional Offices; however, once the Region is aware that an interpreter/translator or foreign language translation business is not providing quality service, the interpreter/translator or foreign language translation business is not utilized again.

The General Counsel's Office is preparing additional instructions to the Regions regarding the use of interpreter services in casehandling, together with "Guidelines" to present to interpreters/translators prior to their service in one of our proceedings.

Foreign Language Affidavits - There is a general consensus that an affidavit should be written in the affiant's own language and an English translation provided. What are the practices/policies of the agency with regard to the taking of affidavits in foreign languages. Who are the "language specialists"; how are they different from translators; what are their duties and responsibilities; and how can a practitioner access a language specialist?

Response - There is no General Counsel policy with respect to taking affidavits in a foreign language. Several years ago, however, we conducted an informal survey of the practices in several Regional Offices. The results of the survey revealed that the practice in five Regions is to write the affidavits of non-English speaking witnesses in the language of the witness and, thereafter, to translate the affidavits into English. In three other Regions, the Board agents write the affidavits of non-English speaking witnesses in the language of the witness, but translate the affidavits only if a decision is made to issue complaint or the dismissal of the charge is appealed. Four Regions write the affidavits in English and translate them to the foreign language if the case is scheduled for trial.

There are a total of nine "language specialists" who work in eight of our Regional Offices. Their duties include translating documents for the Region and acting as an interpreter for Board agents who are meeting with a foreign language speaking witness during an investigation. Language specialists do not act as interpreters at hearings. We also employ "language assistants" and "language clerks," who perform the same duties as language specialists but also perform traditional support staff functions. Language specialists, assistants and clerks only perform work for the Regional Office and are not available to assist private attorneys.

Is there a policy with regard to the use of video at hearings, especially when there is inclement weather?

Response - We have not developed any policy with regard to the use of videoconferencing equipment at either complaint or representation case hearings. There was an instance shortly after the 9/11 tragedy where the parties agreed to the use of videoconferencing equipment in a representation case hearing to accommodate an attorney who could not travel to the regional office to participate. Our understanding was that the system worked fairly well. Beyond that instance, the need for testimony through videoconferencing equipment has simply not come up to the Headquarters Office level. We would attribute this lack of interest to the fact that our hearings are conducted at locations that are convenient to the parties, and the fact that the preference of most parties is that party representatives, witnesses and the hearing officer be at the same location for live testimony.

In *Westside Painting Inc.,* 328 NLRB 796 (1999), the Board considered the use of telephone testimony in an unfair labor practice trial. In that case, the Board reversed the administrative law judge's decision to admit telephonic testimony of a General Counsel witness who was located across the country from the trial, over the opposition

of Respondent. Counsel for General Counsel had argued in that case that the Agency had budgetary issues, that the testimony was limited and that there would be live corroborative testimony. Citing Rule 102.30, the Board found that the only permitted exception to the requirement for live testimony requiring the physical presence of the witness was the use of a deposition.

The Board has never considered whether to permit videoconference testimony in a published unfair labor practice or representation case decision. While the General Counsel has no philosophical objection to the use of video-testimony if all parties agree, this is an issue that the Board will have to resolve.

Outreach Issues - What is the NLRB doing about automated phone systems that are not user friendly?

Response - We regularly examine and refine the ways our customers can reach us with the hope that we can simplify and facilitate the process, all the while being mindful of the costs involved to the Agency's budget. For example, it was because we were concerned about our accessibility to citizens living at a distance from a Regional Office, Subregional Office or Resident Office city, that we joined a number of other Federal agencies in providing a toll-free number for citizen inquiries. Last year, the first full year of operation, over 60,000 calls were logged to the NLRB toll-free number.

Because our Field offices are located in different Federal and private buildings served by different telecommunications companies, they have a number of different phone systems with different capabilities. This precludes a uniform, Agency-wide system for contacting individual offices. About half of our Field offices utilize an automated phone system that connects the caller after only one or two rings to a taped message. The message is brief, usually less than a minute in length, available in English and Spanish, often providing the caller with a brief description of the mission of the Agency and the option to hear information and receive contact instructions about other government offices that deal with other employment-related concerns. If the caller wants to reach the receptionist, he or she can usually access the receptionist at any time by dialing "O" for Operator.

This question prompted us to contact each one of our Field offices utilizing the public information number in an attempt to contact a Board agent. In all but a couple of instances this was accomplished quickly and accurately. There were a couple of offices where the procedures appeared over-long or too confusing and steps have been taken to eliminate the problems.

With respect to other outreach matters, I also advised the Committee of my commitment to continuing the fine working relationships between Regional Directors and local Practice and Procedure Committees. Those relationships contribute significantly to the efficient and effective operations of the Field offices. Regions are encouraged to continue to cultivate those relationships and even to use practitioners in appropriate Regional training.